In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
ANTONIO SERAFIN PEÑA ET AL. } No. 72.

PETACA GRANT IN NEW MEXICO.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS

BRIEF ON BEHALF OF THE UNITED STATES.

On February 17, 1892, Antonio Serafin Peña and others filed their petition in the Court of Private Land Claims for the confirmation of what is known as the Petaca land grant, situate in the counties of Rio Arriba and Taos, in the Territory of New Mexico, and alleged to contain about 186,971 acres (R., 1–6).

On March 1, 1893, L. Z. and M. Z. Farwell filed their petition for the confirmation of the same grant (R., 15–17).

On March 3, 1893, Jose Garcia filed a petition for the confirmation of the same grant (R., 17, 18).

As all of these parties claimed under the same original grant title, the Court of Private Land Claims ordered that these suits be consolidated and proceed thereafter as one case under the title of *Antonio Serafin Peña et al.* v. *The United States*, No. 99 on the docket of the Court of Private Land Claims (R., 24, 25). In all of these cases the United States filed a separate answer, identical in form.

In the petition under which the case was tried (R., 1–6) it was alleged that the petitioners were the legal representatives of the original grantees of the said private land claim, and as such made claim and asserted ownership thereto in fee; that on January 29, 1836, Jose Julian Martinez, Antonio Martinez, Francisco Antonio Atencio, and the sons of the latter made application to the ayuntamiento of the proper district for a grant to a tract of land known as "La Petaca," on the Petaca River, and on February 22 following the ayuntamiento reported to Governor Albino Perez, then political chief of said Territory, that a certain grant for the same land had been forfeited and recommending that he grant the same to the petitioners, except to the sons of Atencio, who were minors. It was alleged that on February 25 the said governor made the grant as prayed for and directed the local alcalde to place the parties in possession, and file among the archives the act of possession and furnish the parties a testimonio thereof; that on March 25 following the said alcalde placed the parties in possession according to the laws then in force, and

executed the act of possession to Manuel Trujillo and thirty-four others, defining the boundaries as set forth therein, assigning to each of them 150 varas from north to south and east to west, together with an interest in common in the whole of said grant, and designating to Felipe Jaquez and five others of said grantees a specified piece of land within the general limits; all of which is set forth in and shown by said grant and act of possession.

It was further alleged that by virtue of such proceedings the said tract was fully segregated from the public domain of the Republic of Mexico and has ever since, and to the time of the filing of their petition, remained in the possession of the original grantees and their legal representatives in fee simple.

It was further alleged that the intent and purpose of the petitioners for and the authority making the grant was that it should be a community grant and inure to the benefit of all persons necessitous of land who should present themselves at the time of juridical possession and comply with other formalities specified, and that said intent and purpose was effectually consummated; that the original title documents for said grant were on file in the office of the surveyor-general of New Mexico, and that, notwithstanding diligent search therefor, the petitioners were unable to find the archive copy or evidence of the said grant because of the incomplete and faulty condition of the archives of the Mexican Government now in the possession of the United States; that the said tract does not lap or conflict in whole or in part with any other grant derived from Spain or Mexico, and that there

are no adverse claimants to the same except under the same grant title, as fully appears in the petition.

That at divers times, as specifically set forth in the petition, proceedings relative to the confirmation of said grant were had before the surveyor-general of New Mexico, but no final or definitive action was ever had in respect thereof by Congress or any tribunal lawfully authorized therefor; that there are no gold or silver mines or minerals of the same within the limits of said grant; that the grant document or expediente of said grant was an instrument duly authenticated and lawfully made, and at the time of the acquisition of the said territory by the United States the said grant was definitive, complete, and perfect.

Plaintiffs filed with their petition a copy of Senate Executive Document No. 31, Forty-fourth Congress, first session, alleging the same to contain correct copies and translations of the original petition, grant, and act of possession, in addition to certain proceedings had before the surveyor-general of New Mexico; and also a certified copy of the plat of an official preliminary survey approved by the surveyor-general of said Territory on December 6, 1878. (R., 116.)

The petition closed with the usual prayer for confirmation of the grant, after allegations for the purpose of deraigning title from the original grantees in the petitioners.

The answer of the United States (R., 24–26), identical in each of the three cases, averred want of knowledge or information as to the allegations in the petition and asked that plaintiffs be put to strict proof of their allegations.

MUNIMENTS OF TITLE.

The muniments of title are fully set forth (R., 7–10) as well as claimants' translation (R., 10–12), to both of which careful attention is suggested, especially the alleged act of possession in Spanish (R., 8, 9) translation of claimants (R., 11, 12).

The petition is directed to the ayuntamiento Ojo Caliente stating, "there is a tract of public land which is called the Petaca," and requesting that the "honorable body will please ascertain and inform the illustrious provincial deputation whatever you may deem proper, etc. (R., 10).

Upon the petition the ayuntamiento made its findings and report (R., 10), which were:

(*a*) "That the parties in the grant accompanying the foregoing petition have not cultivated nor placed any kind of improvements on the land which was given in the long period of full twelve years and which is now again applied for," thus showing the land had formerly been under grant to others and had been abandoned for twelve years; also that the old grant, showing the names of the grantees, was presented with the original petition. Nothing appears to show what became of these old-grant papers referred to.

(*b*) The ayuntamiento was of opinion the former grantees had forfeited their rights and that it should be granted to the new applicants, "*under the conditions expressed in said grant.*" This latter evidently referred to the conditions contained in the old grant documents presented with the original petition for this grant. What

these conditions were can only be gathered from the action taken upon the application, which seems to indicate they must occupy and not abandon it.

(*c*) It was also of opinion that the children of Francisco Antonio Atensio should not become parties in the said possession because they were minors. (R., 10.)

(*d*) The report of the ayuntamiento concludes with the recital: "*The most excellent deputation will direct as may be most in accordance with the laws.*" (R., 10.) Dated at Ojo Caliente, February 22, 1836.

On February 25, 1836, at Santa Fe, Governor Perez acted upon the report of the ayuntamiento. (R., 11.)

It appears there was no objection "to granting the applicant and his associates the land mentioned, *the former grantees not possessing now any right therein, they having abandoned the same*," and directed the alcalde to place "those who now apply for the possession thereof in the required form and in conformity with the law on the subject, setting forth the general donation, in which shall necessarily be stated the boundaries of said possession, and without prejudice to any third party."

The specific directions as to acquiring title are given in unmistakable language, "*Also binding the grantees* to the obligations prescribed by the laws to acquire title, for which purpose the alcalde shall take charge of the general document of distribution, which shall be for the archives, and he shall give testimonios therefrom as may be requested of him, on payment of his corresponding fees."

The form and language of this instrument shows:

First. The land had been under grant and abandoned,

and hence the original grantees named therein retained no rights in the land.

Second. The alcalde might proceed to place those applying in possession.

Third. That the alcalde should set forth the general donation and should necessarily state the boundaries of the general tract within which the individual donations were to be made.

Fourth. The grantees were to be obligated to acquire title in the manner prescribed by law.

Fifth. The alcalde was to take charge of the general document of *distribution* and to give a testimonio to each as requested. Allotments or individual distributions were contemplated, and the original to be returned for record (the archives) testimonios to be given the distributees.

ACT OF POSSESSION.

The act of possession or distribution was executed on March 25, 1836 (R., 11, 12), and after reciting his authority the alcalde declared:

> I proceeded to distribute said land in the presence of the parties interested, *giving to each one of those mentioned in the list* one hundred and fifty varas in a direct line, designating to them as their boundaries on the south the cononcito and lands of Jose Miguel Lucero, on the north the hill commonly called the Tio Ortiz Hill, *on the east the creek of the aguaji of the Petaca*, and on the west the boundary of the Vallecito grant, *within which limits the said new grantees are located.*

It is proper to note at this point that the original act of possession discloses, upon careful examination, that the

original words designating the east boundary have been erased and others substituted or written over them; the effect of this attempted change is to enlarge the tract from east to west.

After designating the general limits within which the distributions were made, the alcalde proceeded to name and define the distributions.

He further states (R., 11, 12) the *grantees in the annexed* list understanding that the pastures, forests, waters, and watering places are in common, "they are further informed that he who fails to occupy and cultivate the land granted within the term of five years, in order to acquire title, the same can not be by him sold, exchanged, or alienated, nor will he be admitted in a new settlement, and if any should of their own accord abandon the tract, they remain informed further that they possess no right, such being the requirements of law."

Then follows a list of the citizens to whom distributions were made. (R., 12.)

The muniments of title were filed with the surveyor-general of the Territory of New Mexico in the early part of 1875, accompanying the petition of claimants, made under the law of July 22, 1854. (R., 6, 7.)

BOUNDARIES.

The general limits or outboundaries within which the allotments or distributions were made are stated by claimants to be as follows:

> Los Linderos, por el sur la puerta del cañoncito y tierras de Jose Miguel Lucero, por el norte la loma que commumente llaman de tio Ortiz, y por el

oriente el arroyo de las aguajes á la Petaca, por el poniente hasta donde sujeta la Merced del Vallecito.

There was no dispute upon the trial as to location of the south and west boundaries.

As to the east boundary, serious contention and objection was made on behalf of the Government based upon the fact that the original act of possession appears to have been tampered with and the original words in Spanish designating the east boundary call were changed and erased and others substituted or attempted to be formed by altering and adding to those written in the original. The Spanish words now appearing in the original are, *por el oriente la rrallo de las aguajes a petaca*, and which have been translated by claimants "*on the east the creek of the aguaje of the Petaca.*"

After careful examination by Mr. Tipton of the changes and erasures, the original Spanish words to designate the east boundary were found to have been "*la mesa de la Petaca*" (see testimony of Mr. Tipton (R., 31-34) and Mr. Clarence Key (R., 76, 77). The original muniments of title are now in the possession of the clerk for the inspection of this court.

The topography of the country to the east of the valley of the Petaca as shown by the testimony of the claimant, Peña (R., 47), would indicate the erasures were made with a view of stretching the width of the grant very materially.

On cross-examination, Antonio Serafin Peña says (R., 47):

Q. You live at La Petaca now, don't you, Mr. Peña?

A. Yes, sir.

Q. You know the country in that neighborhood well, don't you?

A. I do.

Q. Right to the east of the Rio Petaca, the Petaca River, isn't there a mesa, a very high mesa?

A. Yes, sir.

Q. What is the name of that mesa?

A. The Mesa de Titillo.

Q. How long is that mesa?

A. I do not know how long it is.

Q. Is it as much as 15 miles from north to south?

A. I do not know. I do not understand very well about miles.

Q. Well, how many leagues is it?

A. I do not know; I can not state.

Q. Does it go as far south as Cononcito?

A. It passes that way.

Q. And as far north as the Los Tusas?

A. Yes, sir.

Q. Do you know a canyon between the Petaca River and the Arroyo de los Aguages; have you been across that country?

A. Yes, sir.

Q. Is not this Mesa de Tetillo the only mesa between the river Petaca and the Arroyo de los Aguages?

A. Yes, sir.

Q. It is a very high mesa, isn't it?

A. Yes, sir; parts of it are very, and other parts are very low.

It is evident the change in the original boundary call on the east was intended to pass beyond the well-defined and natural boundary so that the shape of the grant would enable the north boundary call, "Tio Ortiz Hill," to be established many miles north of the Tio Ortiz Hill,

situated near the village of Las Tusas. The extreme northeast corner shown on the plat of the preliminary survey made in 1878, upon the petition filed before the surveyor-general under the law of 1854, is designated as "Tio Ortiz Hall" (R., 116).

The evidence disclosed the fact that from Las Tusas south the tract had always been known as the Petaca, while from Las Tusas north it was called that of Las Tusas, which place is shown on the plat (opposite p. 116 of the record) at a little above the center of the tract claimed. The stream called the Rio Petaca evidently controlled the *locus* of the settlements.

POSSESSION.

The act of possession or distribution indicates the limits within the valley of the Petaca. How long they remained can not be determined from the loose and general statements of witnesses. It does unquestionably appear that in 1848 the grant had been abandoned, when is not shown. (R., 128–135.)

The testimony of Jesus Maria Barela, one of the original grantees, was taken before the surveyor-general in 1877 (R., 123), and although he testified he wrote the act of possession he does not state anything about the duration of the possession.

Serafin Peña, the principal claimant in this case, testified before the surveyor-general in 1875 (R., 127, 128), and again in this case (R., 42–49), and it must be admitted he is a remarkably obliging witness.

It appears by Exhibits C and D to his testimony (R., 128–135), taken in 1875, that at the date of the treaty they were not in possession of the tract or the allotments.

Commencing on March 20, 1848, efforts were made to again take possession and make allotments to a large number, including some of the original grantees, which continued down to June 10, 1848. The act of possession seems to have been executed "in the name of the Territory of New Mexico, and that they shall receive that concession in the name of the Constitution of the United States." (R., 132.)

An examination of the proceedings from March 20 to June 10, 1848 (R., 128–135), will at once remove all question as to the possession, its character, and the extent of the grant, and confirm in one's mind the conclusion that the grant had been abandoned and all rights understood to have been lost thereby; otherwise these new proceedings, even under the Mexican Government, would have been unnecessary.

Since the treaty of Guadalupe Hidalgo the number of people who have gone upon this land, including those specifically mentioned in the lists of allotments made in 1848, is very great, and within the general outboundaries claimed now large settlements have grown up, and the Denver and Rio Grande Railroad runs through the same.

The extravagance of and the questionable testimony by which the claimants are seeking judicial cognizance of this grant does not commend its integrity.

The opinion of a majority of the court below confirming the grant to all those who took possession in 1848 for the benefit of all parties in interest, and fixing the boundaries on the north as the lower Tio Ortiz Hill near Buckman's mill and the east boundary at the Mesa de la

Tetillo of the Petaca, was delivered by Mr. Justice Sluss (R., 135–139).

Mr. Chief Justice Reed was of opinion the grant should be confirmed to the extreme outboundaries claimed, and should be to the descendants and representatives of all persons who petitioned for the grant. (R., 139, 140.)

Mr. Justice Murray dissented from both, and was of opinion the grant should be rejected. (R., 140-143.)

The majority opinion evidently overlooked the fact that at the date of the treaty the grant was abandoned and the attempt to again deliver formal possession to a large number of persons never before on the land, as well as to again allot lands to some of those who had formerly occupied allotments made under the Mexican Government, could derive no validity therefrom nor amount to a forgiving of their failure to occupy their lands as required by the original grant and act of possession. (*Cessna* v. *United States*, 169 U. S., 165.)

It is not made to appear that any one of the allottees was given or permitted to return to his original holdings. On the contrary, it appears that allotments were made without regard to the particular land formerly possessed by those who were for the second time placed upon the grant.

The court seems to have disregarded the position always taken by counsel for the Government that the allotments were held in severalty and no community of interest therein was permissible, and as to the unallotted lands the *jus disponendi* passed by the treaty to the United States.

It is not deemed proper or necessary to burden the court with repeated arguments, but simply directing the attention of the court to grounds upon which it is contended a reversal of the judgment below should be predicated and the petitions dismissed.

1. At best, under the original grant and act of possession, no interest passed except to the allotments made in severalty in which there was no community of interest, and the *jus disponendi* of the remainder continued in the Mexican nation and passed by the treaty to the United States.

United States v. *Santa Fe*, 165 U. S., 675.
United States v. *Sandoval*, 167 U. S., 278.
Rio Arriba Land, &c., Co. v. *United States*, U. S., 298.

2. The grant by Governor Perez and the act of possession disclose that the interest passed to the various distributees was only inchoate, and, under the act of March 3, 1891, beyond judicial cognizance.

3. The property had been totally abandoned prior to the treaty of Guadalupe Hidalgo (R. 128–135).

The attempt to reallot portions of the lands to several original allottees and others between March 20 and June 10, 1848, conferred no rights, nor excused the prior abandonment. The laws of Mexico were not in force in New Mexico after the date of the treaty. The attempt to regrant or distribute lands in 1848, so as to excuse the defaults under the former government, was alone the province of the political branch of this Government. (*Cessna* v. *United States*, 169 U. S., 165.)

The opinions of the justices of the Court of Private Land Claims are quite elaborate, and additional discussion seems unnecessary.

On the motion of Farwell to dismiss appeal of the United States, counsel can add nothing to what has been said on brief in opposition.

It is submitted the decree should be reversed and the claims rejected by dismissal of the petition.

Respectfully submitted.

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